No. 489368

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

CITY OF TUMWATER,

Respondent,

v.

ALAN LICHTI
Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable
Cause No. 15-1-00346-5

BRIEF OF RESPONDENT

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1. Is it clear beyond a reasonable doubt that Lichti would have been convicted regardless of the alleged error?

B. STATEMENT OF THE CASE

On May, 29, 2012, the Petitioner, Alan Lichti (hereinafter "Lichti"), purchased a laptop computer from the Tumwater Walmart for $432 in cash. CP 166-67. Less than two and a half hours later, a second man (hereinafter "the man in the yellow shirt") brought Lichti's receipt and the laptop box back to the Walmart to obtain a refund. CP 166. According to the testimony of Walmart's employees, they initially believed that the laptop box was unopened, therefore they issued a cash refund. CP 165. However, the employees came to discover that the box had in fact been opened, and the new laptop had been switched out with an older, broken laptop which had no value. CP 165. Checking their video surveillance, Walmart's loss prevention team found footage of the man in the yellow shirt leaving the store, and getting into Lichti's white Ford focus. CP 166.

The loss prevention team contacted the Tumwater Police Department, at which point Officer Bryant Finch was assigned to investigate the incident. CP 182. Based upon the video surveillance, Officer Finch visited Lichti's home, where he spoke to Lichti's girlfriend,

who provided Finch with a number she claimed was for Lichti's cell phone.[1] CP 188-90. Finch testified that he called the number and left a voicemail, then thirty minutes later, he received a call back from a man claiming to be Lichti.[2] CP 191. That man knew details of the crime only available to the perpetrator,[3] confessed that he had orchestrated the exchange, and that the man in the yellow shirt was unaware of any deception.[4] The man then stated that he would return the laptop and cash to the Tumwater Police Department. CP 195.

Neither the laptop or cash were ever brought to the police station as promised, and Lichti was subsequently arrested and charged with gross misdemeanor theft. CP 196. At trial, Lichti testified that his former roommate must have stolen his new laptop,[5] borrowing his car in the process. CP 211-12. He further stated that he had never spoken to Officer

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[1] At trial, the city offered no evidence to prove the number provided actually belonged to Lichti, nor did Lichti dispute that the number belonged to him.

[2] The call was routed to Finch through Tumwater PD's dispatch, but the number matched the number provided by Lichti's girlfriend. CP 191.

[3] The man claiming to be Lichti knew the laptop had been switched out with an older model, which Finch had not disclosed. CP 193.

[4] The man holding himself out as Lichti claimed that the man in the yellow shirt was an acquaintance known only to him by his street name of "Tennessee." CP 194.

[5] Lichti identified the man in the yellow shirt as his former roommate, William Lee. CP 212. The record does not indicate whether William Lee was ever interviewed, thus it is unclear if the man in the yellow shirt was actually "Tennessee" or William Lee.

Finch, and when asked why he had not reported the theft of his new laptop or confronted his roommate, Lichti responded that he believed in karma. CP 214, 220. Subsequently, Lichti was convicted of Theft in the Third Degree pursuant to RCW 9A.56.050, and sentenced to 364 days in jail. CP 81.

Following his conviction, Lichti appealed to Superior Court, claiming that the jury instructions were erroneous. CP 283-98. Specifically, Lichti argued that the jury instruction's definition of "exerting unauthorized control," commonly referred to as theft by embezzlement, was improper because it did not require Tumwater to prove that a special relationship had existed between Lichti and Walmart.[6] CP 285. The court agreed that the instructions were erroneous, but held that any error was harmless because there was ample evidence that Lichti had wrongfully obtained Walmart's property. Ruling Granting Mot. For Disc. Rev. at 3. Lichti then sought discretionary review from this court, which was granted on the grounds that the superior court had applied an

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[6] The jury instructions took the standard text of WPIC 11A, which stated "... having any property or services in one's possession, custody or control, *as a (nature of custodian)...,*" but excluded the italicized portion. CP 70-71.

incorrect standard for harmless error.[7] Ruling Granting Mot. For Disc. Rev. at 5.

C. ARGUMENT

1. Because There Is Substantial Evidence That Lichti Wrongfully Obtained Another's Property, It Is Clear Beyond a Reasonable Doubt That He Would Have Been Convicted Regardless of the Alleged Error, Therefore the Error is Harmless.

In his only point of error, Lichti claims that the court erred by omitting the special relationship language from the definition of "exerting unauthorized control," therefore, his conviction must be reversed and remanded for new trial. Pet. Brief at 4-8. At this time, the City of Tumwater does not dispute that the special relationship language should have been included in the definition. However, because there is ample evidence to support a finding that Lichti wrongfully obtained the property of Walmart, any error in the jury instructions was superfluous and harmless beyond a reasonable doubt. *State v. Linehan*, 147 Wn.2d 638, 654, 56 P.3d 542 (Wash. 2002) ("The omission of the statutory relationship language required for [theft by "exerting unauthorized control"] is harmless here because there was ample evidence to support a

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[7] The superior court stated that Tumwater did not have the burden of proving that the error was harmless. Ruling Granting Mot. For Disc. Rev. at 3.

finding that [the defendant] "[took] the property or services of another," thereby satisfying ... one of the other definitions of "wrongfully obtains" and "exerts unauthorized control" provided [under the definition of theft]. Thus, while it was error to give the instruction on [exerting unauthorized control], it is superfluous, and the error is harmless beyond a reasonable doubt.").

There are three different ways to commit theft under RCW 9A.56.020 (1)(a), which is the definitional statute providing the basis for Lichti's conviction. *See also* RCW 9A.56.010 (22) (further defining the terms). Notably, the three different methods of "wrongfully obtaining or exerting unauthorized control over the property" of others have been held to be merely definitional, and not alternative means of committing theft.[8] *Linehan,* 147 Wn.2d at 649 ("We hold that the definitions provided in

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[8] An alternative means crime requires unanimity from the jury as to which of the means was committed, because the alternative means are separate and distinct means of committing the offense. *State v. Kitchen*, 110 Wn.2d 403, 410-411, 756 P.2d 105 (1988). By comparison, definitional means of committing crimes are not distinct offenses, rather they are instructive and non-exclusive methods by which one may commit a crime, and are included within a statute simply to clarify. *State v. Laico*, 97 Wn. App. 759, 762, 987 P.2d 638 (Wash. Ct. App. 1999) ("Merely because a definition statute states methods of committing a crime in the disjunctive does not mean that the definition creates alternative means of committing the crime."); *State v. Smith*, 159 Wn.2d 778, 785, 154 P.3d 873 (Wash. 2007) (noting that definitions merely elaborate and clarify, and the alternative means doctrine does not extend to mere definitional instructions).

former RCW 9A.56.010 do not create additional alternative means of theft."). Thus, because the different methods are not alternative means, error in one of the definitions is harmless, so long as there is substantial evidence supporting at least one of other the methods. *Id.* at 649-50 ("The jury need not be unanimous as to any of the definitions nor must substantial evidence support each definition. There is no requirement that the jury unanimously agree that [the defendant's] conduct satisfies the definition [of theft by "exerting unauthorized control], commonly referred to as theft by embezzlement, or that there be substantial evidence of theft by embezzlement.").

In the present case, the jury was provided definitions for two of the methods outlined in RCW 9A.56.020 (1)(a); namely, the definitions for "wrongfully obtaining" and "exerting unauthorized control." While the jury instructions for "wrongfully obtaining" have not been alleged to be improper, Lichti objects to the definition for "exerting unauthorized control." However, even presuming that the omission constituted error, or that this issue can be raised for the first time on appeal, the fact remains that substantial evidence only needs to support one of the definitions of theft for a conviction to be upheld; the jury was provided with the correct definition of "theft by wrongfully obtaining;" and substantial evidence

supports Lichti's conviction under "wrongfully obtaining." Thus it cannot be said that the error affected the outcome.

a. *The evidence against Lichti, and the improbability of Lichti's own version of events, establishes beyond a reasonable doubt that he would have been convicted regardless of the alleged error.*

Unless there is a reasonable belief that Lichti would have been found innocent, but for the alleged error, his conviction must be sustained. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)) ("the … test for determining whether a constitutional error is harmless: Whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."). Weighing the evidence against Lichti, it is clear beyond a reasonable doubt that even if the jury instructions had omitted any mention of unauthorized control, he would have been convicted of wrongfully obtaining Walmart's property. *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (holding that certain constitutional errors may be deemed harmless); *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) ("The harmless error rule preserves an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.").

The uncontroverted facts that led to Lichti's conviction are as follows; first, Lichti purchased a new laptop in cash from Walmart at 4:48 PM. CP 184. Then, at 7:11 PM, the man in the yellow shirt, riding in Lichti's car, returned the laptop box, containing a broken laptop, for a cash refund. CP 184-86. Whoever switched out the new laptop with the older broken laptop was careful to open the packaging in such a way that it was not immediately apparent that the box had been opened. CP 165. Lichti testified that as soon as he purchased the laptop, he left it unopened in his room, along with the receipt and keys, made himself a snack, and left to visit friends in another vehicle. CP 211-12, 219. Lichti further testified that when he returned and found his brand new laptop missing, he took no action, because he believed in karma, that he had no knowledge of the broken laptop, and he offered no additional corroboration for his version of events. CP 220.

To find Lichti's explanation believable, the jury would need to accept that 1) Lichti purchased a new laptop, but left it in his room without ever opening it; 2) Lichti's roommate came across the unopened box and receipt; 3) Lichti's roommate independently hatched a plan to exchange the new laptop with a broken laptop he had lying around, which Lichti had never seen before; 4) Lichti's roommate took Lichti's keys from his room, and used the car to return the laptop; 5) this all happened in the span of a

little more than two hours; and 6) Lichti took no action once he discovered his brand new laptop was missing because of general notions of karma.

To most reasonable jurors, such a sequence of events would be highly improbable, but if that alone is insufficient to establish beyond a reasonable doubt that Lichti would have been convicted regardless of the alleged errors, then fortunately, there are more uncontroverted facts against Lichti. For example, Officer Finch arrived at Lichti's residence and spoke to his girlfriend about the theft allegation. CP 188-90. Lichti's girlfriend provided him with a number she claimed was for Lichti's cell phone. CP 190. Thirty minutes later, Finch received a phone call from that number by a man claiming to be Lichti, who knew details of the crime, and who confessed to exchanging the broken laptop. CP 190-95. Lichti testified that he was unaware of Finch's visit, and never spoke to him. CP 214.

Again, to believe Lichti's version of events, the jury would need to accept that 1) Lichti's girlfriend conspired with the roommate to frame

Lichti by providing Officer Finch with the wrong cell phone number, even though Lichti never denied that the number was his;[9] 2) Lichti's roommate furthered his Machiavellian scheme to frame Lichti by calling Finch, having an extensive conversation pretending to be Lichti, and confessing to carrying out the crimes in his name;[10] and 3) Lichti's girlfriend never mentioned to him that law enforcement had come by his home with questions about the laptop. If Lichti is in fact innocent, then he has terrible taste in companions. More importantly, while Lichti is free to claim that he was the victim of a criminal conspiracy, and was framed by his girlfriend and roommate, the jury is just as free to disbelieve his story,

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[9] Theoretically, it could be possible that Lichti's roommate stole his phone and called Officer Finch, but it would have been very difficult for the roommate to find out Finch had called Lichti, find Lichti, steal the phone, and call Finch within thirty minutes, then delete Finch's voicemail. CP 188-90.

[10] At trial, Lichti's defense focused on two discrepancies with Finch's recollections of the phone call, though neither is particularly persuasive. First, Lichti testified that he had a steady job at the time of the theft, thus he was not short on money as the man holding himself out to be Lichti had claimed. CP 211. However, the mere fact that Lichti had a job does not mean he was financially secure.

Next, Lichti noted that Finch testified that "Lichti" had claimed to have two children, whereas in real life, Lichti only had one son. CP 215. This is likely just a mistake by Finch. Lichti's son lived with him two weeks per month, therefore Lichti's roommate would know that Lichti had one, not two, children. CP 215. Consequently, the fact that Finch recalled "Lichti" claiming to have two children does not make it more likely that the roommate was on the phone rather than Lichti. As a result, neither of these discrepancies creates reasonable doubt.

which based on their verdict, they did. The mere fact that Lichti offered an alternate explanation does not create reasonable doubt that but for the omission, he would have been found innocent. Instead, reasonable doubt is created by credible and corroborated evidence, which Lichti did not offer.

Simply put, Lichti's explanation that his girlfriend and roommate carried out an on-the-fly conspiracy to frame him for a $432 laptop was not found credible. The court may have erred by instructing the jury on "exerting unauthorized control," but because this is not an alternative means crime, this error is harmless so long as substantial evidence supports the conviction under "wrongfully obtaining." *Linehan*, 147 Wn.2d at 649.

Lichti's brief has fixated upon *Neder* and *Brown*'s brief use of the term "uncontroverted evidence," arguing that the correct standard for harmless error is actually that evidence must be uncontroverted, but this claim is not supported by the law. Pet. Brief at 14-16. Yes, those cases state that when evidence is uncontroverted, error will be held to be harmless, but nowhere do these cases state that evidence must be uncontroverted for harmless error to exist. *Neder*, 527 U.S. at 18; *Brown*, 147 Wn.2d at 341. To the contrary, those courts make it explicit that the test for harmless error is reasonable doubt, not that the evidence must be

uncontroverted,[11] and *Linehan* does not mention the term "uncontroverted" even once. *Linehan*, 147 Wn.2d at 654. To require that that harmless error must rest on uncontroverted evidence, no matter how improbable or far-fetched the alternative facts may be, would render the doctrine meaningless. *Neder*, 527 U.S. 18 ("To set a barrier so high that it could never be surmounted would justify the very criticism that spawned the harmless-error doctrine in the first place: "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it."").

Accordingly, the ultimate question is, if the instructions had omitted any mention of unauthorized control altogether, is there reasonable doubt that the outcome would have been different? *Neder*, 527 U.S. at 19. In light of the evidence against Lichti, and Lichti's own improbable explanation, the answer is no, the verdict would have been the

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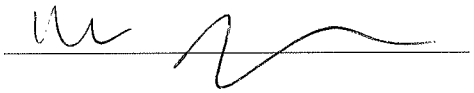
[11] *Neder*, 527 U.S. at 19 ("[A] court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element. If the answer to that question is "no," holding the error harmless does not reflect a denigration of the constitutional rights involved." On the contrary, it "serves a very useful purpose insofar as [it] blocks setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial."); *State v. Brown*, 147 Wn.2d at 341 ("In order to hold the error harmless, we must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.").

same. As a result, his conviction must be upheld on the grounds that any error was harmless.

D. CONCLUSION

For these reasons, the City of Tumwater asks that Lichti's appeal be denied.

Respectfully submitted this 11 day of January, 2017.



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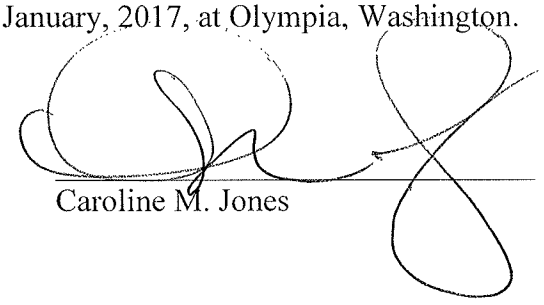

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